86-1444

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1986

MICHAEL BIGLEY, GENE AMICARELLI
and SALEEM AZAD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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25 pp

QUESTIONS PRESENTED

On November 30, 1984, Petitioners and eight (8) other persons were charged in a multi-count indictment with the offense of mail fraud contrary to Title 18 United States Code Section 1341. Petitioners Bigley and Amicarelli are chiropractors. Petitioner Azad is an allopathic physician specializing in radiology. Each Petitioner was associated with a medical/chiropractic clinic located in Highland Park, Michigan. There were 155 counts in the indictment and the essence of the charge was that all Defendants were associated with the clinic which engaged in the practice of administering unnecessary medical tests which were billed to Blue Cross/Blue Shield of Michigan. Petitioners Amicarelli and Bigley were charged only in Counts 118 through 155. Petitioner Azad was charged in all counts.

Petitioners Bigley and Amicarelli had been subpoenaed to appear before the grand jury to provide testimony on April 4, 1984 and April 5, 1984. They appeared and testified without an attorney. At the time they were both engaged in the practice of chiropractic in Orlando, Florida. Subsequent to indictment Petitioner Amicarelli's counsel was provided a copy of his grand jury testimony. Attached to it, apparently through inadvertence, were nine (9) pages of grand jury commentary including statements by the Assistant United States Attorney. This inadvertent disclosure caused Petitioners to file a Motion to Dismiss the Indictment for Grand Jury Impropriety and Motion for Disclosure Relating to Grand Jury Proceedings. Each motion was denied by the District Court.

These facts raise these questions:

I.

DID COMMENTS BY AN ASSISTANT UNITED STATES ATTORNEY BEFORE THE GRAND JURY IMPINGE UPON PETITIONERS' CONSTITUTIONAL RIGHT TO AN UNBIASED, INDEPENDENT AND PROPERLY INFORMED GRAND JURY?

II.

DID THE AFOREMENTIONED COMMENTS CONSTITUTE GROUNDS FOR DISCLOSURE OF MATTERS OCCURRING BEFORE THE GRAND JURY PURSUANT TO RULE 6(C)(ii), FEDERAL RULES OF CRIMINAL PROCEDURE?

LIST OF PARTIES

The parties to this proceeding in the United States Court of Appeals for the Sixth Circuit were as follows:

1. Michael Bigley, Defendant-Appellant.
2. Gene Amicarelli, Defendant-Appellant.
3. Saleem Azad, Defendant-Appellant.
4. United States of America, Plaintiff-Appellee.

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OPINIONS BELOW

The Per Curiam opinion of the Court of Appeals was filed on December 5, 1986. It is reproduced in the Appendix to this Petition at pp. A-1 – A-10. The opinion was not recommended for publication. However, the government filed a formal motion to publish the opinion in part, because of the frequency in which grand jury abuse issues are raised in the Eastern District of Michigan. The government's motion is reproduced in the Appendix at pp. A-i1 – A-12. On January 8, 1987 the Court of Appeals granted the government's motion.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on January 19, 1987. The Court of Appeals' order is reproduced in the Appendix at p. A-13.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1986. Petitioners' request for a rehearing and suggestion for rehearing en banc was denied on January 19, 1987. This Petition has been filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FEDERAL RULE OF CRIMINAL PROCEDURE

Rule 6(e)(2), Federal Rules of Criminal Procedure provides:

> "A grand juror, an interpreter, a stenographer, an operator of a recording devise, a typist who transcribes recorded testimony, an attorney for

> the government, or any person to whom disclosure is made under Paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court."

Rule 6(e)(3)(C)(ii) provides:

> "Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> "(ii) When permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

STATEMENT OF THE CASE

On November 30, 1984, Petitioners and eight (8) other persons were charged in a multi-count indictment with the offense of mail fraud contrary to Title 18 United States Code Section 1341. The indictment is reproduced in the Appendix at pp. A-14–A-28. Petitioners filed a Motion to Dismiss the Indictment for Grand Jury Impropriety and Motion for Disclosure Relating to Grand Jury Proceedings. The United States District Court denied the motions. Petitioners began a lengthy jury trial and after several weeks entered conditional guilty pleas pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure allowing them to preserve their right to challenge the previously described pretrial rulings. Petitioner Amicarelli plead guilty to a single count. Petitioners Azad and Bigley

each plead guilty to two counts. All other counts were dismissed and the maximum terms of possible imprisonment were limited to one year, sixteen months and eighteen months respectively.

Petitioners appealed to the Sixth Circuit Court of Appeals. Their appeal and Petition for Rehearing were denied.

REASONS FOR GRANTING THE WRIT

I.

IMPROPER PROSECUTORIAL COMMENT BEFORE THE GRAND JURY WHICH IMPLICATES THE CONSTITUTIONAL REQUIREMENT THAT A GRAND JURY MUST ACT IN AN UNBIASED, INDEPENDENT AND INFORMED MANNER REQUIRES THE ACTIVE SUPERVISION OF THIS COURT IN ORDER TO PRESERVE THE INTEGRITY OF THE GRAND JURY PROCESS AND PREVENT DIVERSION OF THE GRAND JURY FROM ITS CHERISHED AND HISTORICAL ROLE AS A "PROTECTIVE BULWARK BETWEEN THE ORDINARY CITIZEN AND THE OVER ZEALOUS PROSECUTOR".

In *United States* v *Dionisio*, 410 U.S. 1, 17 (1973), this Court noted that the grand jury's historical role is that of a "protective bulwark between the ordinary citizen and the over zealous prosecutor . . ." In *Wood* v *Georgia*, 370 U.S. 375, 390 (1962), Mr. Chief Justice Warren, writing the opinion for the Court, described the function of a grand jury with respect to its protection of the rights of citizens, in stronger terms, stating:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing

> between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

The Fifth Amendment therefore requires that a grand jury act in an informed, independent and unbiased manner. These critical tasks, however, cannot be achieved in the absence of unbiased prosecuting officials whose concern for justice transcends all considerations other than those devoted to the sanctity of the grand jury process. The importance of the grand jury function, as well as the "gain in prosecutor's influence over grand juries", requires the courts to strictly scrutinize a prosecutor's conduct in obtaining an indictment. See e.g. *United States* v *Hogan*, 712 F2d 757, 759 (2d Cir. 1983). Moreover, where a prosecutor departs from normal practices and governing principles of the law intended to protect all citizens before a grand jury, dismissal may lie for prosecutorial misconduct, based upon the supervisory power of the courts. *United States* v *Estepa*, 471 F2d 1132 (2d Cir. 1972); *United States* v *Jacobs*, 547 F2d 772, 778 (2d Cir. 1976), cert denied, 437 U.S. 31 (1978).

The American Bar Association Standards Relating to the Prosecution Function, in particular Standard 3.5(b) as to Grand Juries, admonishes that a prosecutor should give due deference to the grand jury's status as an independent legal body. A prosecutor should not make statements or arguments in an effort to influence the grand jury in a manner that would be inadmissible at trial before a petit jury. The Standards recognize that a federal prosecutor's power to influence a grand jury is great. As a representative of the United States Government, a prosecutor possesses potent credibility. Therefore, when he or she speaks, it must be with the care

that befits the position and duties of the United States Attorney who holds a special trust.

Neither this Court's decision in *Costello* v *United States*, 350 U.S. 359 (1956) nor any other decision by this Court invalidate the above articulated principles as they apply to the grand jury. However, the Sixth Circuit Court of Appeals has, as demonstrated by this case, established an intolerable standard which is inconsistent with these principles and serves no purpose other than to weaken the bedrock of this historic and constitutionally sanctioned body. This unfortunate circumstance evolves from earlier Sixth Circuit precedent. See *United States* v *Griffith*, 756 F2d 1244, 1249 (6th Cir.), cert denied, 106 SCt 114 (1985). What the Sixth Circuit refers to as a "strict standard" has obviously distorted perception of what type of prosecutorial behavior is appropriate.[1]

Prior to trial Petitioners, through inadvertence, received nine (9) pages of commentary during which the prosecutor was able to generate a host of severely prejudicial and improper remarks. Sadly, these included comments wherein the prosecutor:

1. Gave unsworn testimony to the grand jurors which purported to summarize the testimony of a prospective expert witness (Dr. Nelson) who was not called to testify and who, in fact, was not an expert.

2. Made highly perjorative and derogatory unsworn statements that Petitioners were guilty of the alleged offense under investigation.

3. Made inflammatory and prejudicial unfounded comments speculating that Petitioners Bigley and Amicarelli were currently engaged in criminal acti-

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[1] Slip Opinion at page A-4.

vity in the State of Florida at the time of their appearance and testimony.

4. Made improper statements and arguments in an effort to influence the judgment of the grand jury.

5. Injected personal opinions of the credibility of Petitioners Bigley and Amicarelli and another witness who was later indicted.

Regrettably, the Court of Appeals chose to characterize the offending remarks benignly as a "summary" of expected testimony. Slip opinion at page A-5. The prosecutor's "summary" of Dr. Nelson's "statements" and unnamed others was, however, grossly inaccurate and totally inconsistent with actual trial testimony.[2]

At trial it was revealed that Dr. Nelson did not even work at the Hamilton Clinic at the time period involved in the indictment. He only possessed a limited license and did not even receive a full license to practice chiropractic in Michigan until a year and three months after he left clinic employment. In fact, he was not an expert and the government actually objected to defense counsel's efforts to qualify him as such at trial.

The Court of Appeals also overlooked the fact that Dr. Nelson's trial testimony and opinion was considerably less prejudicial than the inaccurate summary provided to the grand jury by the prosecutor. Dr. Nelson actually gave testimony concerning an element of legitimacy at the clinic by indicating that most of his patients were "repeat patients, patients who were coming in for maintenance care." Like Petitioners Amicarelli and Bigley, Dr. Nelson did neurological checks, and performed spinal adjustments all in the course of seeing an average of

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[2] Petitioner Amicarelli's grand jury testimony and the attending commentary are reproduced in the Appendix at pp. A-29 – A-59.

from thirty (30) to forty (40) patients per day. He did opine that the clinic was not run as professionally as he thought it should because not everyone wore white and he felt that everyone should wear white. Also, he felt that the office staff did not treat patients professionally and the clinic was not clean since everyone that came in was smoking and there were several cigarette burns in the carpet.

Further, the Court of Appeals overlooked the fact that in Michigan a chiropractor by law is not qualified to give opinions on the subject of medical necessity. See e.g. *Demido* v *Attorney General,* 100 Mich App 254 (1980). In short, the prosecutor's "summary" to the grand jury was damning; the actual testimony of Dr. Nelson was not. And Petitioners have always contended that no witness, expert or otherwise, actually appeared before the grand jury to give first hand evidence conforming to the prosecutor's "summary".[3] The prejudice to Petitioners is obvious since the subject matter of the investigation was complex and highly technical involving questions concerning the medical necessity of numerous and varying medical tests and procedures.

Moreover, Petitioners contend that the Court of Appeals' opinion has now transformed the word "summary" into a talisman which renders prejudicial prosecutorial comment innocuous. The utilization of such terms as "summary" by prosecutors to supplant real evidence is especially dangerous because it necessarily undermines grand jury independence and subjects the jury to manipulation. The Court of Appeals derided Petitioners' suggestion that the prosecutor's comments constituted

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[3] The government has never taken issue with Petitioners' assertion that Nelson never appeared before the grand jury since no Jencks material was disclosed.

unsworn testimony.[4] Thus, the Court of Appeals focused upon one portion of the prosecutor's comments and characterized it as "preview" of testimony. In so doing, however, the Court failed to recognize and appreciate that the overall tenor of the statements constituted assertions of fact. This could be made no more clear than when the prosecutor stated:

> "MR. SOISSON: For example, Dr. Nelson will tell you everybody got the same test. They were just routine. There were other people at the clinic that have been interviewed. They have indicated that it was just routine. Everybody got the same tests. *The record can indicate that everybody got the same tests."* p. A-55.

It seems unfair and inaccurate in Petitioners' view for the Court of Appeals to find that such comments do not constitute a form of testimony not under oath. Even the United States Department of Justice takes a contrary view. Thus, Justice Department publications repeatedly admonish federal prosecutors to avoid expressing personal opinions as to guilt, the strength of the evidence or credibility of witnesses. United States Department of Justice, Narcotic and Dangerous Drug Section Monograph "Federal Grand Jury Practice Manual" (1983) at 45.

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[4] It is incongruous that the Court of Appeals found the prosecutor's remarks to be appropriate yet the government actually cited *United States* v *Mechanik*, __ U.S. __ (1986), and argued harmless *error* as an alternative theory. In the government's view, Petitioners' conditional guilty pleas rendered harmless any prejudicial conduct impacting upon the grand jury's charging function. Of course, such an argument effectively abrogates Rule 11(a)(2), Federal Rules of Criminal Procedure. Since, however, the government was not forced to consent to these conditional pleas, any analysis purportedly dealing with "substantial social costs" has no application here. The government also misconstrues the narrow holding in *Mechanik* and inappropriately attempts to extend it beyond a technical violation of Rule 6 to a constitutional violation involving fundamental fairness and due process.

In discussing the axiom that a prosecutor cannot act as a witness before the grand jury, the "Federal Grand Jury Practice Manual", *supra*, observes that the prosecutor must:

> "Be extremely careful in responding to questions that he or she does not give evidence." Manual at 166.

Of course, a prosecutor may effectively give evidence either under the guise of lengthy leading questions or, as in this instance, under the guise of responses to grand jury questions. C.f. *United States* v *Samango*, 450 FSupp 1097 (D. Hawaii 1978), aff'd, 607 F2d 827 (9th Cir. 1979). In either case it seems clear to Petitioners that a grossly inaccurate and incomplete "summary" presented by a prosecutor not under oath is no less harmful than the one presented by a government agent or other witness under oath. In fact, the former is obviously more insidious since grand jurors are not likely to challenge an Assistant United States Attorney or question the accuracy of his comment.

The evidence eventually produced at trial did not conform to the prosecutor's improper "summary". This is apparent from the fact that those Defendants charged in all counts were acquitted on 65 counts and one was acquitted on all counts. Furthermore, the government has to this day never explained nor did the Court of Appeals notice that Petitioner Amicarelli was actually charged with aiding and abetting in certain counts where patients were seen, examined and received medical tests or x-rays while Petitioner Amicarelli was off sick with hepatitis. See at p. A-66. Petitioners' Sentencing Memorandum is reproduced at Appendix pp. A-65–A-72. Moreover, Petitioners contend that the record shows in this case that the grand jury was not fully and fairly informed and did not independently

evaluate evidence. This is underscored by the charging document itself since the indictment contains two (2) separate counts based on the identical same conduct and same check. (See Counts 147 and 153 of indictment, page A-28).

Petitioners contest the notion that the prosecutor's conduct in the instant case was appropriate. Nor is it fair to characterize the remarks as "offhand". The prosecutor made no effort to qualify his responses. He gave lengthy, detailed responses obviously implying familiarity with the "statements" of many witnesses. Moreover, it should have been evident to the Court of Appeals that the grand jury room is the private preserve of the prosecutor. Where he gives detailed answers inaccurately conveying evidence or makes prejudicial insinuations without basis in fact, it simply runs afoul of common sense to suggest that such actions do not impinge upon the ability of the grand jury to exercise independent judgment.

The litmus to gauge the prosecutor's faithfulness to important Fifth Amendment principles here may first be found in the prosecutor's willingness to subpoena Petitioners Bigley, Amicarelli and one other physician who was later indicted. Petitioners have always noted that it is contrary to the published policy of the United States Department of Justice to subpoena a known target of investigation without providing a supplemental warning to be administered on the record. See United States Attorney's Manual Title 9, Chapter 11, page 12. Petitioners recognize that this Justice Department policy does not create a procedural right. Yet, Petitioners also recognize that the apparent willful disregard for the policy demonstrates a state of mind which in the specific context of facts herein has probative value on the issue of intentional grand jury misconduct.

Petitioners Amicarelli and Bigley abide by their belief that the prosecutor improperly assailed their credibility as well as injected inflammatory speculation without any basis in fact that they were engaged in criminal activity in Florida. The Court of Appeals' opinion, however, misconstrues a comment implying misconduct in New York as an "admonition" curing the reference to possible criminal conduct in Florida.

> "A JUROR: Did this New York thing come up before?
>
> MR. SOISSON: I never heard of it, that is New York's problem.
>
> A JUROR: I don't know. It might have been another one of those mills if he didn't think it was unusual.
>
> MR. SOISSON: I wouldn't doubt it a bit. He might even be operating one in Florida right now."
>
> p. A-58.

Nor can it be suggested that a fair reading of the grand jury minutes yields any conclusion other than that the prosecutor was attacking the veracity of both Petitioners Bigley and Amicarelli immediately after their testimony. Why else would the prosecutor suggest that they were "not necessarily selected because of their veracity . . ." p. A-53. And the prosecutor's disingenuous remark concerning the circumstance of their appearance underscores Petitioners' common sense view of the record. The prosecutor actually told the grand jury that Petitioners were selected because the government had been "unable to contact and interview them before". p. A-53. This comment of course makes little sense in light of the fact the government was obviously able to contact both Petitioners Bigley and Amicarelli, serve them a subpoena and they traveled to Detroit from Orlando, Florida to provide their testimony.

The prosecutor in his response in the District Court asserted that his damaging commentary was not prejudicial. He also suggested that Petitioners were simply complaining because he had failed to present all evidence available at the grand jury proceedings. Indeed, in the District Court the prosecutor suggested that a grand jury investigation was meant to be "a one-sided affair", and the grand jury itself was merely "an investigative prosecutorial arm of the executive branch of government". The government's answer is reproduced in the Appendix at pp. A-60–A-64. Far from failing to present favorable evidence to the grand jury, the prosecutor not only mischaracterized Dr. Nelson's information as previously discussed herein, but more significantly provided a mountain of his own unsworn conjecture and opinion which added a false aura of factual support to the government's case and may well have deceived the grand jurors. *United States* v *Hogan, supra*. Thus, the prosecutor in both word and action casually ignored and denigrated important constitutional principles. Quite frankly, however, "the grand jury is not meant to be the private tool of a prosecutor", *United States* v *Fisher*, 455 F2d 1101, 1105 (2d Cir. 1972).

The record of improprieties is clear. The prosecutor testified that the Hamilton Clinic was ". . . nothing more than a mill . . ." He testified that the clinic was "entirely unethical . . ." He insinuated racist motives. He testified that "everybody got the same tests". He insinuated that the only reason any patients went to Hamilton Clinic was to collect money. He testified that all of the persons going to the clinic were "phony patients".[5] And, of

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[5] The overwhelming majority of patients produced at trial, however, testified that they had legitimate physical problems and valid symptoms which were far-ranging. See Petitioner Amicarelli's Sen-

(*concluded on page 14*)

course, he bolstered his unsworn opinion about unnecessary medical testing by corroborating it with the opinion of his own personal and unnamed physician:

> "MR. SOISSON: . . . You know, I can't see it myself. I don't think my doctor would do that to me." p. A-59.

Petitioners respectfully submit, however, it should never be deemed appropriate for a prosecutor to supplant real evidence with his own personal opinion. The Court of Appeals, however, chose to view the transcript of grand jury proceedings in a wooden and unrealistic manner. The use of unsworn "summary" responses and a paraphrase of prospective testimony of witnesses who, in fact, were never presented, necessarily manipulated the grand jury, deprived them of their independence and tainted any subsequent indictment. A grand jury is entrusted with enormous investigative powers so that it can function as an independent jury reviewing evidence, assessing witness credibility, analyzing and sifting through conflicting facts and testimony in order to determine the sufficiency and appropriateness for indictment of fellow citizens. This responsibility is not delegated to an Assistant United States Attorney. It is anomalous to implicitly suggest, as the Court of Appeals' opinion has done, that the prosecutors may relieve the grand jury of

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(*continued from page 13*)

tencing Memorandum. Interestingly, the prosecutor implied that any employee who worked at the clinic for a substantial time could be a target, yet none of those others were charged or given immunity because the government (not the grand jury) concluded they were not culpable. These included other professionals and another radiologist who performed the same function as Petitioner Azad. See Petitioner Amicarelli's Sentencing Memorandum at 3, Appendix pp. A-66 – A-67. The radiologists performed their task of reading x-rays in a building separate from the clinic. Thus, non-indicted and non-culpable professionals who allegedly "wrote" the lie were not charged, but the man who merely "read" the lie, Petitioner Azad, was.

their task by improper prosecutorial comment. The Sixth Circuit's measure of what is appropriate is the wrong one. The case of *United States* v *Griffith, supra,* is obviously predicated upon the notion that a constitutional violation cannot undermine the jury's ability to make an informed and objective evaluation per se. Unfortunately, such a view eliminates the need for a grand jury and those functions entrusted to the jury may instead be wielded by a government attorney relegating the grand jury's role to that of a rubber stamp. This Court must intervene and actively reaffirm those principles so essential to the grand jury process. A grand jury investigation should never be subverted or transformed into an empty ritual or elaborate charade. As stated by the United States Court of Appeals for the Ninth Circuit:

> "If the grand jury is to accomplish either of its functions, independent determination of probable cause that a crime has been committed and protection of citizens against unfounded prosecutions, limits must be set on the manipulation of grand juries by over zealous prosecutors." *United States* v *Samango,* 607 F2d 877, 882 (9th Cir. 1979).

II.

IMPROPER PROSECUTORIAL COMMENT BEFORE THE GRAND JURY CONSTITUTES ADEQUATE GROUND FOR DISCLOSURE OF OTHER MATTERS OCCURRING BEFORE THE GRAND JURY PURSUANT TO RULE 6(C)(ii), FEDERAL RULES OF CRIMINAL PROCEDURE.

By deeming the prosecutor's conduct appropriate, the Court of Appeals conveniently eliminated any need to discuss the question of when a criminal defendant is entitled to discovery of grand jury materials. Petitioners contend here that their Fifth Amendment right to be indicted only by a legally constituted and unbiased grand

jury was at issue in the District Court. Because the prosecutor gave false, prejudicial, unsworn testimony, much of which was misleading to the grand jury, it was both appropriate and imperative that the District Court allow access to the balance of grand jury proceedings.

What has always been clear to Petitioners was that other than three (3) witnesses that the government later indicted (Petitioners Amicarelli, Bigley, and Co-Defendant Dean) and a solitary patient, i.e., Johnny Cobb, the government presented no other witnesses to the grand jury other than possibly a case agent who would have presented some kind of summary or synopsis.[6]

Of course, Mr. Cobb's testimony as a lay person could not and did not demonstrate lack of medical necessity with regard to the many patient files relating to the various counts in the indictment. Thus, it is readily apparent that there was no expert testimony to support any conclusion regarding medical or chiropractic necessity other than those comments at issue here. Under these circumstances Petitioners did demonstrate adequate grounds for further disclosure.

Petitioners submit that this Court's ruling in *United States* v *Mechanik*, ___ U.S. ___ (1986), militates in favor of more liberal pretrial disclosure because the Court clearly recognized that dismissal of the indictment is indeed an appropriate remedy for a violation of Rule 6 of the Federal Rules of Criminal Procedure. The Fifth Amendment right to an indictment by an unbiased grand jury, the procedural and ethical obligations of the United States Attorney and the societal interest in protecting the in-

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[6] Petitioners drew such reasonable conclusion from the fact that no other Jencks material was disclosed other than that mentioned above. And the case agent did not testify, therefore, his Jencks material was not disclosed. The government has never challenged the accuracy of this suggestion.

tegrity of the grand jury process call for no less consideration. As observed by Justice Marshall in *Mechanik:*

> "Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times, all prosecution is in the hands of officials." (Citation omitted)

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: March 6, 1987